

THIRD ANNUAL
NORTHEAST SURETY AND FIDELITY CONFERENCE

TAKING THE SHOW ON THE ROAD - PREPARING AND TRYING
A SURETY OR FIDELITY CASE
IN A DISTANT AND UNFAMILIAR VENUE

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I.
INTRODUCTION

- A. This is a compilation of methods and procedures for handling cases out of town. Some ideas are based upon my own experience, some are "borrowed" from other counsel. Still others are based upon what I didn't do, or what others didn't do, and yet we wished we had.
- B. Obviously, none of these methods or procedures can guarantee victory, nor can they be substitutes for the thorough preparation, convincing presentation, and good measure of luck required to prevail in any case. However, I am convinced that these methods and procedures were at least part of the reasons we prevailed in those out of town cases where we won, and were positive factors even in those where we lost.
- C. My personal, informal and unscientific poll reveals that a surprising number of experienced and qualified trial counsel have tried most, if not all, of their cases within the immediate geographical area of their offices and have not had occasion to "take their show on the road."

- D. "Out of town" case is defined as a case where location of trial is far enough away from trial counsel's home and office so that trial counsel cannot return to home or office at the end of the trial day.
- E. While it is not uncommon for in-house claims rep to be responsible for a case being handled in a far away city, usually the outside counsel handling the case is located within that far away city.
- F. A significant number of cases do arise, however, where both the claims rep and trial counsel are far away from the actual place of trial. It is this type of case which is addressed here.
- G. The handling of an out of town case is different than the handling of a case in the immediate geographical vicinity of trial counsel. Claims reps need to be aware of these differences so they can insure that trial counsel is proceeding properly when handling the out of town case.

II. DEFINING THE OUT OF TOWN CASE

- A. As pointed out above, an out of town case is any case where trial counsel cannot return home or to office each evening after trial day is completed.
- B. The initial decision as to whether or not a case is, or is not, an out of town case must be made by claims representative.

- C. If there are no approved trial counsel located in the immediate geographical vicinity where case is to be tried, then case is almost certainly an out of town case.
- D. Even if there are "approved" attorneys within the immediate geographical area, claims rep must determine whether these "approved" counsel are truly experienced in handling fidelity and surety matters or whether they are predominately property and casualty defense lawyers without such experience.
- E. Two choices if there are either no approved counsel within an immediate geographical area, or if approved counsel do not have sufficient fidelity or surety experience:
 - 1. Hire local counsel and have them learn fidelity or surety law applicable to case.
 - 2. Hire experienced out of town counsel and have them learn the locality.
- F. Only real choice is to retain trial counsel who is experienced in fidelity and surety law, and who is able to travel to location of trial within roughly a half a day.
- G. This is true even if opposing counsel is from immediate geographical area where trial will be held.
- H. Out of town counsel experienced in fidelity or surety matters should then affiliate local co-counsel who is experienced and highly respected in the community as a competent trial attorney.

- I. Local trial counsel affiliated with case need not be experienced in fidelity and surety matters as long as such counsel is experienced in trial matters generally and is well known and well regarded in the community.
- J. Local trial counsel need not spend a great deal of time learning facts of case, nor need local trial counsel participate in most discovery and other trial preparation matters.

III.

PREPARATION FOR TRIAL IN THE OUT OF TOWN CASE

- A. Take advantage of every opportunity, and create other opportunities if necessary, to appear in person before the judge who will try the case. Always have local trial counsel with you on those occasions.
- B. Have local trial counsel introduce you to the court and court personnel. Capitalize blatantly on the good will and reputation of local trial counsel.
- C. Be as visible as possible in the community accompanied by your local trial counsel.
- D. Conduct locally held discovery depositions at the courthouse, if possible.
- E. Consider using different experts at trial than those who may have been retained during investigation phase of claim.

- F. Consult with local trial counsel to determine if different expert is needed who will "sell" in the community where trial is to be held.
- G. Utilize local businesses close to the courthouse during trial.
 - 1. Stay at local hotel close to courthouse.
 - 2. Use local court reporters.
 - 3. Rent machines or purchase supplies locally.
- H. Set up "war room" either at hotel or at office of local trial counsel and use room for witness preparation and other trial preparation in between trial days.
- I. Insure that telephone, copy, fax, and word processing facilities are available at "war room."

**IV.
EDUCATE THE COURT**

- A. Necessary in all cases to educate the court. However, in out of town cases even more effort must be expended to bring the issues of case to the court.
- B. Even judges in larger metropolitan areas may have limited experience in fidelity or surety cases. Even more true in small communities.
- C. Efforts to educate court on factual and legal issues presented in case must begin as soon as possible after suit commenced and must be as continuous as possible during preparation for trial up to commencement of trial.

- D. Educate court through motions, preliminary status conferences, pretrial conference, briefs, etc.

V.

TRIAL OF THE OUT OF TOWN FIDELITY OR SURETY CASE

- A. Have corporate representative of fidelity or surety company present at counsel table throughout trial.
- B. Have local trial counsel present throughout trial.
 - 1. Local trial counsel should pick jury if it is a jury trial.
 - 2. Local trial counsel should handle some witnesses during trial, preferably local witnesses.
 - 3. Trial counsel should confer regularly and often, in sight of court or jury, with local trial counsel throughout course of trial.
- C. Use as many local witnesses as possible without creating redundancy.
- D. Use lots of visual aids, blow-ups, overhead projections, charts, graphs, etc. - put on a show!
- E. Try case as you normally would, but, in small communities, avoid antagonism and hostility during examination, particularly with local witnesses.
- F. Do NOT attempt to adjust your trial style or trial personality to fit the community. The court or jury will sense almost immediately if you are being "phony" and this will be fatal to your case.

- G. Develop a theme for your case which emphasizes basic human values; i.e. "a man's word is his bond," etc.
- H. Do not under any circumstances and at all costs, get into a hostile or adversarial position with the judge. Avoid through motions in limine and side bar conferences any confrontation with the court in front of the jury.

**VI.
CONCLUSION**

- A. Preparation and trial of an out of town fidelity or surety case requires extra care and handling by both outside counsel and in house claims representative. Claims representatives need to be aware of these different methods for handling out of town cases so that they can properly direct outside counsel when "taking the show on the road."

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